



Volume 84 | Issue 4

Article 5

June 1982

John Locke's Theory of Government and Fundamental Constitutional Rights: A Proposal for Understanding

Nicholas L. DiVita

West Virginia University College of Law

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>

 Part of the [Natural Law Commons](#)

Recommended Citation

Nicholas L. DiVita, *John Locke's Theory of Government and Fundamental Constitutional Rights: A Proposal for Understanding*, 84 W. Va. L. Rev. (1982).

Available at: <https://researchrepository.wvu.edu/wvlr/vol84/iss4/5>

This Student Note is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

STUDENT NOTES

JOHN LOCKE'S THEORY OF GOVERNMENT AND FUNDAMENTAL CONSTITUTIONAL RIGHTS: A PROPOSAL FOR UNDERSTANDING

I. INTRODUCTION

The function of the United States Constitution is to proscribe governmental power. It limits not only the power of the separate governmental branches with respect to each other, but also limits the power of government to affect the conduct of private individuals. This article will focus on the latter limiting function, that is, the body of law that interprets the constitutional limits of governmental activity as it affects individual rights.

Formidable questions are raised when the government acts to curtail an individual's freedom to engage in conduct for which no textual constitutional guarantee exists, yet for which constitutional protection is sought.¹ Once it is resolved that the constitution does protect certain conduct from governmental interference despite the lack of a textual basis,² it becomes possible to build a theory of these unwritten personal freedoms.

The degree of freedom allowed by the constitution can be better understood by reference to the political theory under which the constitution was formed. In general, this article will expose these root ideas of constitutional liberty, connect them with existing constitutional law in special areas of asserted liberty, and by extrapolation, provide new ways to understand protection of that liberty. In particular, it will show a conceptual similarity between cases protecting the free exercise of religion, and the cases protecting privacy, or "substantive due process rights,"³ under various guarantees of the constitution, especially where such

¹ See, e.g., Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L. J. 920 (1973).

² See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

³ See notes 92 & 160 *infra* and accompanying text.

cases are found on essentially indetical conduct by the individual.

An examination of the political theory underlying the text of the constitution will show that certain liberty claims should be accorded constitutional protection even though such claims do not fit neatly into the categories traditionally accorded such protection. An expanded definition of the right of privacy will be shown to merge conceptually with certain free exercise cases. In essence a proper understanding of constitutional law depends on viewing it as monolithic, and not as a mixture of diverse rights.

This article does not examine or criticize the legal analysis courts actually use in deciding issues of constitutional law. It merely articulates a theory of our constitutional system, and the way in which that theory may color how we think of a constitutional liberty case.

II. POLITICAL THEORY, PRIVACY, AND FREE EXERCISE OF RELIGION

A. *Political Theory of the Constitution—The Thought of John Locke*

The constitution is deeply indebted to the thought of John Locke.⁴ In fact, his philosophy has served as its foundation. The founders of the American constitution were greatly influenced by classical liberalism,⁵ and its fundamental principle of individualism.⁶ In a political sense the philosophy of individualism means that government should be created to protect the individual, not the other way around. Since the political philosophy of John Locke

⁴ L.B. BOUDIN, GOVERNMENT BY JUDICIARY 82; LEVY, OUR CONSTITUTION: TOOL OR TESTAMENT? 172 (1965); BODENHEIMER, JURISPRUDENCE 49-50 (1974); RICHARDS, THE MORAL CRITICISM OF LAW 41 (1977).

⁵ B. RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 599 (1945) [hereinafter cited as RUSSELL]; "Decades of highly varied use . . . have robbed 'liberalism' of much of its specific meaning. In its early classic usage, liberalism . . . implied primacy for the individual and strict limitations on governments to ensure full freedom for the individual to serve his needs as he saw fit." K. DOLBEARE & P. DOLBEARE, AMERICAN IDEOLOGIES 38 (1976) [hereinafter cited as DOLBEARE].

⁶ *Id.* See also COHEN, THE FAITH OF A LIBERAL (1946).

⁷ J. LOCKE, OF CIVIL GOVERNMENT 164 (Ernest Rhys ed. 1924 [hereinafter cited as CIVIL GOVERNMENT]); See also *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943).

espoused this very notion,⁸ the founding fathers turned to John Locke for guidance. Locke's theory of government postulates that societies in their original condition comprised only individuals, without government. Individuals in this "state of nature"⁹ possessed certain inherent rights and liberties which existed independently of government.¹⁰ In the state of nature one's conduct was governed by natural law,¹¹ not by governmentally created, or positive law.

Locke explained that the state of nature was "inconvenient" and provided an inadequate guarantee of individuals' inherent rights and liberties.¹² Thus, Locke thought, at some distant point in the past¹³ individuals in the state of nature decided that they could best preserve their paramount interests in property and personal liberty by forming a government to protect these inherent interests.¹⁴ This formation of government, which Locke called the social contract,¹⁵ required that individuals in the state of nature surrender a part of their natural freedom to government in exchange for the government's obligation to protect the natural rights of individuals.¹⁶

Since the government formed by the social contract was by the consent of the governed, it had power to rule only to the extent that it acted within the limits imposed on it by the very

⁸ DOLBEARE, *supra* note 5, at 38.

⁹ CIVIL GOVERNMENT, *supra* note 7; SMITH, THE CONSTITUTION: A DOCUMENTARY & NARRATIVE HISTORY 43-44 (1980).

¹⁰ See *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965), where it was observed by the Court that the right of privacy antedates the Bill of Rights and other deeply rooted social institutions. See also *United States v. Cruikshank*, 92 U.S. 542, 553 (1875) and *Culp v. United States*, 131 F.2d 93, 98 (8th Cir. 1942), where it is noted that fundamental rights exist independently of any constitutional provision.

¹¹ CIVIL GOVERNMENT, *supra* note 7, at 118; SIGMUND, NATURAL LAW IN POLITICAL THOUGHT 81 (1971) [hereinafter cited as SIGMUND].

¹² SIGMUND, *supra* note 11, at 85.

¹³ It is not certain whether Locke actually believed the state of nature to have been historic reality, or merely an illustrative hypothesis. RUSSELL, *supra* note 5, at 263. Lord Russell professes to be "afraid that Locke thought it to have been an historical fact." *Id.*

¹⁴ The difficulty with preservation of individual rights in the state of nature was that every man was the judge of his own cause when there arose a conflict with another. There was no neutral entity to which one could turn for resolution of conflicts, CIVIL GOVERNMENT, *supra* note 7, at 180, hence the need for government, SIGMUND, *supra* note 11, at 85.

¹⁵ RUSSELL, *supra* note 5, at 631.

¹⁶ *Id.* See also *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943).

reason it was created:¹⁷ to preserve the "lives, liberties, and estates of individuals."¹⁸ This is of course consonant with the importance Locke placed on individual liberty, but more significantly, foreshadows the concept of limited government embraced by the founders of the constitution.¹⁹ In fact the exaltation of individual liberty,²⁰ and limited government are two sides of the same coin. The difficulty of constitutional law is interpreting the social contract, that is, deciding where the powers of government end and the liberty of the individual begins.

In his political model, Locke placed the bulk of governmental power in the legislative body.²¹ The legislature represented the power surrendered by the people in the formation of the social contract. As such its acts were limited by the range of power given to it by the people. Where the legislature overstepped its prescribed powers and interfered with an individual's freedom to act, Locke envisioned that the individual could resort to the judicial branch of government for relief.²² Today, this dynamic remains the model for resolving issues of constitutional liberty.

¹⁷ SIGMUND, *supra* note 11, at 84-85.

¹⁸ Locke said the sole purpose of men's putting themselves under government is the "preservation of property." CIVIL GOVERNMENT, *supra* note 7, at 180. He simultaneously reminds that "property" is to be understood as the "lives, liberties, and estates of individuals." *Id.* Thus understood, there can be no objection to Locke's thought as being applicable only to narrow notions of property *per se*, even though he does seem preoccupied with it. RUSSELL, *supra* note 5, at 627. See *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) where the Court interpreted the applicability of the jurisdictional counterpart to 42 U.S.C. § 1983 and noted that "the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property . . . , no less than the right to speak or the right to travel, is in truth a 'personal' right. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning with the other. [This] has long been recognized. J. LOCKE OF CIVIL GOVERNMENT 82-85. . . ." See also SIGMUND, NATURAL LAW IN POLITICAL THEORY 86 (1971); Hamilton, *Property—According to Locke* 41 YALE L.J. 864 (1932).

¹⁹ See, e.g., THE FEDERALIST No. 10 (J. Madison) where liberty is recognized as essential to the political structure of the government, and the role of government seen to consist in curtailment only the violent exercise of liberty.

²⁰ See note 5 *supra* and accompanying text.

²¹ CIVIL GOVERNMENT *supra* note 7, at 192.

²² RUSSELL, *supra* note 5 at 630; Thomas Jefferson wrote: "what I disapproved of from the first moment . . . was the want of a bill of rights to guard liberty against the legislative as well as executive branches of government. In the argument in favor of a declaration [bill] of rights, you omit one which has great weight with me, the legal check it puts into the hands of the judiciary." Letters from Thomas Jefferson to Francis Hopkinson & James Madison (March 13 & March 15, 1789), reprinted in THE PAPERS OF THOMAS JEFFERSON IXV 650, 659 (J. Boyd

It should come as no surprise that constitutional liberty can be analyzed in terms of the thought of an eighteenth century political philosopher. Locke's thought pervades the constitution;²³ Locke's thought, the constitution, and constitutional law itself are but statements on the individual's relationship to government. It seems only natural that a judge faced with a constitutional law issue should consider Locke's influence as a guide to his decision-making because in a real sense a judge faced with a constitutional issue must himself act as a political philosopher.²⁴

B. *The Constitutional Right of Privacy*

Since 1965, when the Supreme Court decided *Griswold v. Connecticut*,²⁵ the nation's courts have experienced an explosion of litigation in which individuals have pressed claims of personal liberty to engage in a particular course of conduct in the face of governmental interference.²⁶ The Court in *Griswold* failed to articulate a clear basis for its ruling that the use of contraceptives was constitutionally protected from governmental interference. The Court proclaimed the right to be one of privacy, which derived

ed. 1958); THE FEDERALIST No. 78 (A. Hamilton); McLaughlin, *What Has the Supreme Court Taught? Part II* 72 W. VA. L. REV. 326, 347 (1970).

²³ BODENHEIMER, JURISPRUDENCE 49-50 (1974); Compare CIVIL GOVERNMENT, *supra* note 7, at 190 with THE FEDERALIST No 51 (A. Hamilton or J. Madison); See also Konvitz, *Privacy and the Law: A Philosophical Prelude*, 31 LAW & CONTEMP. PROB. 273, 276 (1966).

²⁴ L. CARTER, REASON IN LAW 184 (1979). Consider the following from the United States Supreme Court, in which the Court indulged in a bit of political theory:

There are . . . rights in every free government beyond the control of the state. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism . . . There are limitations on such power which grow out of the essential nature of all free governments, implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name.

This Lockean passage is found in *Loan Ass'n v. Topeka*, 20 U.S. (Wall.) 655, 66-63 (1875). See also *Calder v. Bull*, 1 U.S. (S. Dall.) 386, 388-89 (1798).

²⁵ 381 U.S. 479 (1965).

²⁶ See Notes, *On Privacy: Constitutional Protection of Personal Liberty*, 48 N.Y.U.L. REV. 670 (1973); Fried, *Privacy*, 77 YALE L. J. 495 (1980); J. Weiss & S. Wizner, *Pot, Prayer, Politics and Privacy: The Right to Cut Your Own Throat in Your Own Way*, 54 IOWA L. REV. 709 (1969); Note, *The California Marijuana Possession Statute: An Infringement on the Right of Privacy or Other Peripheral Constitutional Rights?*, 19 HASTINGS L.J. 758 (1968); *Comments on the Griswold Case*, 64 MICHIGAN L. REV. 197 (1965).

from "penumbras of" or "emanations from" the various guarantees of the Bill of Rights.²⁷ The two concurrences relied on the ninth amendment²⁸ and the due process clause²⁹ respectively, to buttress the Court's decision to immunize the constitutional claimant's conduct.

Supreme Court cases after *Griswold* have explained the source of the right of privacy no more clearly. Privacy has been viewed as a compendium of rights, as in *Griswold*, and has been seen as an aspect of the "liberty" protected by the due process clause.³⁰ It has also been seen as a "shadow" of the rights protected by the first, third, fourth, and fifth amendments,³¹ and on one occasion the Court even relied on the preamble to the constitution as a justification for extending privacy rights.³²

Regardless of the labels attached to the right, the result has been the same: certain conduct has been left to individual decisionmaking and is not allowed to be supplanted by governmental action. The Supreme Court³³ as well as certain of the lower federal courts³⁴ have acknowledged that privacy is in essence the right to make certain kinds of important decisions without state interference.³⁵

²⁷ 381 U.S. 479, 484.

²⁸ *Id.* at 486.

²⁹ *Id.* at 499. Justice Harlan felt that the "Due Process Clause of the Fourteenth Amendment stands . . . on its own bottom." *Id.* at 500.

³⁰ *Carey v. Population Serv. Int'l*, 431 U.S. 678, 684 (1977); *Roe v. Wade*, 410 U.S. 113, 153 (1973).

³¹ *Whalen v. Roe*, 429 U.S. 589, 598 n.23 (1977).

³² *Doe v. Bolton*, 410 U.S. 179, 210 (1973) (concurring opinion); At least one commentary has suggested that the "spirit" of the constitution, if not the text of the constitution, justifies the right to privacy. Wilkinson & White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 611-13 (1977). For a portrait of a court troubled by the lack of a textual basis in the constitution for the right of privacy, see *J.P. v. DeSanti*, 653 F.2d 1080, 1090 (6th Cir. 1981).

³³ *Whalen v. Roe*, 429 U.S. 589 (1977).

³⁴ *Andrews v. Ballard*, 498 F. Supp. 1038 (S.D. Tex. 1980); *Lovisi v. Slayton*, 363 F. Supp. 620 (E.D. Va. 1973), *aff'd*, 539 F.2d 349 (4th cir. 1976), *cert. denied sub nom.*, *Lovisi v. Zahradnick*, 429 U.S. 977 (1977).

³⁵ *Whalen v. Roe*, 429 U.S. 589, 599-600; *J.P. v. DeSanti*, 653 F.2d 1080, 1087 (6th Cir. 1981); *Lovisi v. Slaton* 363 F. Supp. 620, 625. Laurence Tribe has cogently articulated this idea. Tribe has written that in *Roe v. Wade*, a typical privacy case, The Court was not, after all, choosing simply between the alternatives of abortion and continued pregnancy. It was instead choosing among alternative allocations of decisionmaking authority, for the issue it faced was whether the woman and her doctor, rather than an agency of government, should have the authority to make the abortion decision at various

When one thinks of constitutional privacy as a sphere of independent decisionmaking, one is freed from the narrow conception of privacy as a right to do a particular act behind closed doors.³⁸ Moreover, thinking of privacy as a right to make personal decisions without interference helps understand the early Supreme Court fundamental rights cases such as *Meyer v. Nebraska*³⁷ and *Pierce v. Society of Sisters*,³⁸ where the Court seized on the word "liberty" in the due process clause, and extrapolated from it an unwritten constitutional right of parents to govern their children's upbringing.³⁹ Those cases did not involve the mere right to act freely in the privacy of one's home, rather, they involved the broader right to govern private behavior.

In this context, privacy can be seen as flowing from the concept of Lockean individualism on which the scheme of constitutional liberty rests. As a matter of common sense, the capacity to make independent and untrammelled decisions is the hallmark or personal autonomy.⁴⁰ A moment's reflection reveals that individualistic liberty of Locke's political order is closely and necessarily related to the modern version of the constitutional right of privacy.⁴¹

For purposes of actual case decisions it would not seem to make any difference what a court refers to when it holds private

stages of pregnancy. the appellant's argument in *Roe* was not that the Court should decide "for abortion," but rather that the Court should transfer to role of decisionmaker from the government to the woman herself. Despite what the Court's opinion seemed to say, the result it reached was not the simple "substitution of one non-rational judgment for another concerning the relative importance of a mother's opportunity to live the life she has planned and a fetus's opportunity to live at all," but was instead a decision about *who should make judgments of that sort.* (emphasis in original) (Footnote omitted)

Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 11 (1973).

³⁸ See Konvitz, *Privacy and the Law: A Philosophical Prelude*, 31 LAW & CONTEMP. PROB. 273, 279 (1966); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (dissenting opinion).

³⁷ 262 U.S. 390 (1923).

³⁸ 268 U.S. 510 (1925).

³⁹ See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 902 (1978). [hereinafter cited as TRIBE].

⁴⁰ Craven, *Personhood: The Right to Be Let Alone*, 1976 DUKE L.J. 699; Eichbaum, *Toward an Autonomy-Based Theory of Constitutional Privacy: Beyond the Ideology of Familial Privacy*, 14 HARV. CIV. R.—CIV. L. L. REV. 361 (1979).

⁴¹ *Richards v. Thurston*, 424 F.2d 1281, 1285 (1st Cir. 1970) (suggesting a unitary liberty from which constitutional rights derive).

conduct constitutionally immune from governmental interference. For instance, it would make little difference if in *Griswold* the majority of the Court had said that the right to use contraceptives was protected not by penumbras or of emanations from the Bill of Rights, but rather by the liberty of the fourteenth amendment due process clause.⁴²

Only under definitions of privacy that refer exclusively to the right to do certain acts behind closed doors,⁴³ or to control the amount and kind of information disclosed about oneself,⁴⁴ would there be a different result in the decisions a court would reach. These definitions of privacy are much narrower than the definitions used in *Griswold*, *Roe v. Wade*,⁴⁵ *Whalen v. Roe*⁴⁶ and certain lower federal court cases.⁴⁷ Since the court in these latter cases has employed the broader definitions, it is understandable that they have reached similar conclusions. The broader definitions of privacy incorporates the concept of personal autonomy which the Supreme Court has called the "sphere of independent decision-making." This broader definition is also closer conceptually to the expansive idea of liberty envisioned by the founders of the constitution when the American "social contract" was first drawn up in 1787.⁴⁸

Therefore, it reasonably can be said that the comparatively recent right of privacy created by the Supreme Court finds its roots in the political theory of the constitution as espoused by Locke. Although as a practical matter it may be true that "the precise source of the right of privacy is not as important as the

⁴² The Court seems to think that privacy cases such as *Roe v. Wade* 381 U.S. 479 (1965), and *Doe v. Bolton*, 410 U.S. 113 (1973) were not based on "substantive due process," a rubric commonly associated with *Lochner v. New York*, 198 U.S. 45 (1905). Compare *Roe v. Wade*, 410 U.S. 113, 167 (1973) (Stewart, J., concurring) with *Doe v. Bolton*, 410 U.S. 179, 212 n.4 (1973) (Douglas, J., concurring). It is difficult to dispute that what went on in *Roe* under the aegis of privacy very much resembles what went on in cases like *Locher*. BERGER, *GOVERNMENT BY JUDICIARY* 265-69 (1977). See also Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L. J. 920, 937-43 (1973); Craven, *Personhood: The Right to be Let Alone*, 1976 DUKE L. J. 699, 712; Cf. *Ferguson v. Skrupa*, 372 U.S. 726 (1963) (laying to rest any suggestion that the court still adheres to the *Lochner* doctrine.)

⁴³ See note 36 *supra*.

⁴⁴ A. WESTIN, *PRIVACY AND FREEDOM* (1967); See also *Whalen v. Roe*, 429 U.S. 589 (1977).

⁴⁵ 410 U.S. 113 (1973).

⁴⁶ 429 U.S. 589 (1977).

⁴⁷ See note 34, *supra*.

⁴⁸ RUSSELL, *supra* note 5, at 633.

fact that [the Court in *Griswold*] found such a right to exist,"⁴⁹ doctrinal clarity requires it be understood that the right is not something which came into existence only with *Griswold*; rather, as Justice Douglas thought, the "right of privacy [is] older than the Bill of Rights."⁵⁰ From such a view it becomes evident that the intellectual baggage carried by the founders of the constitution, is the fountainhead of the judicially created right of privacy. "[E]very man has a 'property' in his own 'person'. This nobody has any right to but himself."⁵¹ The Lockean conception has been reinforced, usually *sub silentio*, by the procession of constitutional privacy decisions since *Griswold*.⁵² "[A]s Locke would say, [privacy is] the kind of 'property'⁵³ with respect to which its owner has delegated no power to the state."⁵⁴

C. *Free Exercise of Religion: Privacy Implications of the Functional Definition of Religion*

The first amendment to the constitution protects the free exercise of religion.⁵⁵ This right has been made applicable to the states by the fourteenth amendment. Certain cases in which free exercise claims have been advanced bear a close analytical relationship to certain cases in which the constitutional right of privacy has been asserted.⁵⁷ The closeness of this theoretical relationship rests primarily on the discussion set forth above about the Lockean governmental dynamic and its exaltation of individual liberty.

This article considers two types of free exercise cases. The first type involves the issue of what constitutes a religion for the

⁴⁹ Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 229 (1965).

⁵⁰ 381 U.S. 479, 486; See also *Roe v. Wade*, 410 U.S. at 169 (1973); *Poe v. Ullman*, 367 U.S. 497, 542-43 (1961) (Douglas, J., dissenting from dismissal of appeal).

⁵¹ *Supra* note 7, at 130. For a discussion of Locke's conception of property, see note 18 *supra* and accompanying text.

⁵² See, e.g., Konvitz, *Privacy and the Law: A Philosophical Prelude*, 31 LAW & CONTEMP. PROB. 272, 276 (1966).

⁵³ See note 18 *supra* and accompanying text.

⁵⁴ Konvitz, *supra* note 52, at 280 Cf. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 859-60 (1978).

⁵⁵ "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," U.S. CONST. amend. I.

⁵⁶ *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

⁵⁷ See generally, *TRIBE*, *supra* note 39, at 884-85.

purposes of constitutional protection.⁵⁸ Recent judicial pronouncements on the contours of the constitutional meaning of religion raise interesting questions with respect to whether conduct not ordinarily thought of as "religious" may conceivably be accorded constitutional protection on grounds other than free exercise.⁵⁹ The second type of case involves plaintiffs whose conduct is such as may be held protectable either by the free exercise clause or by the constitutional right of privacy.⁶⁰

The free exercise cases demonstrate that certain species of religious based conduct can be viewed persuasively as the kind of conduct that would or should be held protectable by the constitutional right of privacy. This presumes: 1) an expanded definition of the right of privacy,⁶¹ traceable to the Lockean govern-

⁵⁸ Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978). Note, *Defining Religion: Of God, The Constitution, and the D.A.R.*, 32 U. CHI. L. REV. 533 (1965).

⁵⁹ An interesting illustration of the conceptual similarity between religious and political beliefs is contained in Bertrand Russell's *A HISTORY OF WESTERN PHILOSOPHY* (1945). Russell argues that Marxism and Christianity are doctrinally indistinguishable. Writing in connection with the idea that the theme of certain religious and political doctrines is "such as to make a powerful appeal to the oppressed and unfortunate of all times," Russell observed that "Saint Augustine [one of the fathers of Christianity] adapted this [theme] to Christianity, Marx to Socialism. To understand Marx, [and by implication, Christianity] one should use the following dictionary:

Yahweh = Dialectical Materialism

The Messiah = Marx

The Elect = The Proletariat

The Church = The Communist Party

The Second Coming = The Revolution

Hell = Punishment of the Capitalists

The Millennium = The Communist Commonwealth

The terms on the left give the emotional content of the terms on the right, and it is this emotional content, familiar to those who have had a Christian . . . upbringing, that makes Marx's eschatology credible. B. RUSSELL, *A HISTORY OF WESTERN PHILOSOPHY* at 363-64. Russell's parallels are unconventional but plausible. They are important because they illustrate just how difficult it is to say what a religion is for a constitutional or any other purpose. See *Thomas v. Review Bd of Ind. Employment Sec.*, 101 S.Ct. 1425, 1430 (1981); See also Boyan, *Defining Religion in Operational and Institutional Terms*, 116 U. PA. L. REV. 479 (1968).

⁶⁰ Cf. *Teterud v. Burns*, 522 F.2d 357 (8th Cir. 1975) with *Richards v. Thurston*, 424 F.2d 1281 (1st Cir. 1970); Cf. *Stevens v. Burger*, 428 F.Supp. 896 (E.D.N.Y. 1977); *Whalen v. Roe*, 429 U.S. 589 (1977).

⁶¹ W.O. DOUGLAS, *THE RIGHT OF THE PEOPLE* 87 (1958):

Government exists for man, not man for government. The aim of government is security for the individual and freedom for the development

mental dynamic described above,⁶² and 2) an expanded constitutional definition of religion⁶³ for free exercise purposes, to be developed in this section of the article.

In 1890, the Supreme Court adopted a theistic definition of religion. It held that for religious conduct to be protected under the free exercise clause it must have some reference to a supreme deity.⁶⁴ Traces of this view were visible as late as 1951.⁶⁵ With the advent of the Second World War the lower federal courts began to reassess their position on the constitutional meaning of religion. Perhaps out of a realization of American society's extreme cultural variety, substantial inroads were made on the purely theistic definition that then held sway. As a matter of analysis, it would also be correct to say that the federal courts did not really abandon a theistic definition and embrace a non-theistic one, but rather, they merely expanded their idea of what may constitute a deity for purposes of the theism requirement. In any event, it was with the conscientious objector cases that the changes first became apparent.⁶⁶

In *United States v. Ballard*⁶⁷ and *West Virginia Board of Education v. Barnette*⁶⁸ the Supreme Court itself greatly changed the contours of the protection afforded by the free exercise clause by adjusting the definition of religion. In *Ballard*, the Court was confronted by a group challenging mail fraud convictions as vio-

of his talents. The individual needs protection from government itself—from the executive branch, from the legislative branch, and even from the tyranny of judges. The Framers of the Constitution realized this and undertook to establish safeguards and guarantees. Some of these concern the procedure that must be followed if government undertakes to move against the citizen. Others concern substantive rights such as freedom of religion and freedom of assembly.

There is indeed a congeries of these rights that may conveniently be called the right to be let alone. They concern the right of privacy—sometimes explicit and sometimes implicit in the Constitution. *This right of privacy protects freedom of religion and freedom of conscience.*

(emphasis added).

⁶² See notes 9-18 *supra* and accompanying text.

⁶³ See note 58 *supra*.

⁶⁴ *Davis v. Beason*, 133 U.S. 333 (1890).

⁶⁵ *Zorach v. Clauson*, 343 U.S. 306, 313 (1951).

⁶⁶ See, e.g., *United States v. Kauten*, 133 F.2d 703 (2d Cir. 1943); *contra* is *Berman v. United States*, 156 F.2d 377 (9th Cir. 1946).

⁶⁷ 322 U.S. 78 (1944).

⁶⁸ 319 U.S. 624 (1943), *overruling* *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940).

lative of the free exercise clause.⁶⁹ Justice Douglas writing for the Court noted that the free exercise clause precludes any inquiry into the truth or falsity of one's religion.⁷⁰ The Court expressly recognized that what may be religion to one may be heresy to another.⁷¹ In *Barnette*, it held that the constitution prohibited the government from coercing adherence to any belief.⁷² Specifically, the Court stated that "if there is any fixed star in our constitutional constellation, it is that no official can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."⁷³ The upshot of these decisions was that the parameters of what constituted a religion for purposes of free exercise protection were judicially and constitutionally uncertain. The Court was trying to apply legal standards to a fact pattern that defied rules.

These developments set the stage for a series of decisions in the 1960s which further evidenced an expansion of the scope of allegedly religious-based conduct for which constitutional protection could be asserted. In *Torcaso v. Watkins*⁷⁴ the Court held violative of the free exercise clause the State of Maryland's refusal to give the plaintiff a notary public commission (for which he was otherwise qualified) because he would not profess a belief in God. *Torcaso* marked the Court's first application of the free exercise clause to the belief of atheism. The rejection of theism was itself a belief entitled to free exercise protection. By way of dictum the Court suggested in *Torcaso* that systems of belief such as "Buddhism, Taoism, Ethical Culture, Secular Humanism, and others" were entitled to free exercise protection.⁷⁵

⁶⁹ 322 U.S. at 79. Defendant's alleged crime was organizing and promoting their religion through the mails. The United States charged that the group used "false means, and fraudulent representations and premises" in the process of organizing and promoting. Thus the defendants' religious freedom was directly at stake. *Id.*

⁷⁰ *Id.* at 86.

⁷¹ *Id.* Compare *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943).

⁷² 319 U.S. 624, 642.

⁷³ *Id.*

⁷⁴ 367 U.S. 488 (1961). See also *Whitehill v. Elkins*, 389 U.S. 54 (1967) (held unconstitutional to deny plaintiff a job at a state university for his refusal to sign an oath certifying that he had no plans to overthrow the government.)

⁷⁵ *Id.* at 495 n.11.

*United States v. Seeger*⁷⁶ and *Welsh v. United States*⁷⁷ were logical extensions of *Torcaso*. These cases demonstrated that the Supreme Court had adopted a "functional" definition of religion for free exercise purposes.⁷⁸ In *Welsh*, a case with facts practically identical to *Seeger*,⁷⁹ the Court followed *Seeger* and held that the claimant's allegedly religious-based conduct deserved constitutional protection if in the claimant's life the convictions or beliefs on which the conduct is based "function as a religion."⁸⁰ This theoretical shift has not gone unnoticed by the lower federal courts.⁸¹

The effect of the functional definition of religion is to enlarge substantially the kinds of conduct for which constitutional protection may be available. "Thus interpreted, the free exercise clause becomes a charter for personal autonomy in matters"⁸² where conduct is based on a belief or value which operates in the claimant's life as a "source of being, of . . . ultimate concern."⁸³

The kinds of conduct which under the new definition of religion could merit free exercise protection are perhaps surprising. However, the assertion that free exercise protection must, consistently with the *Seeger-Welsh* analysis, be extended, is not unreasonable. For example, given the nature of the beliefs held by a fervent Marxist, it can be soundly argued that conduct based on such beliefs is entitled to free exercise protection. Clearly the function of Marxism in the life of a Marxist parallels the function of Christianity in the life of a Christian.⁸⁴ The ramifications of this development have yet to be discussed directly by the courts but have been dealt with by commentators.⁸⁵

⁷⁶ 380 U.S. 163 (1965).

⁷⁷ 398 U.S. 333 (1970).

⁷⁸ Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978). Although *Seeger* and *Welsh* are arguably statutory decisions of non-constitutional dimensions, federal courts have had no difficulty in treating them as precedent for free exercise decisions. See, e.g., *United States v. Sisson*, 297 F.Supp. 902, 909 (D. Mass. 1967). See also *Callahan v. Woods*, 658 F.2d 679, 683 n.4 (9th Cir. 1981).

⁷⁹ *Welsh v. United States*, 398 U.S. 333, 335 (1970).

⁸⁰ *Id.* at 340; *Seeger*, 380 U.S. 163, 187; See also *supra* note 81, at 1072.

⁸¹ *Malnak v. Yogi*, 440 F. Supp. 1289 (D.N.J. 1977), *aff'd*, 592 F.2d 197, 200 (3d Cir. 1978) (concurring opinion).

⁸² See Note, *supra* note 78 at 1089.

⁸³ 380 U.S. 163, 187, *quoting*, P. TILICH, *THE SHAKING OF THE FOUNDATIONS* 57 (1944).

⁸⁴ See note 59 *supra* and accompanying text.

⁸⁵ See, e.g., Boyan, *Defining Religion in Operational and Institutional Terms*,

It takes little imagination to see the theoretical overlap⁸⁶ with respect to the conduct protected by the free exercise clause, and that protected by certain privacy cases, specifically those involving governmental attempts to shape the mind and beliefs of an individual.⁸⁷ The enlarged definition of religion suggests that the free exercise guarantee is part of the broader right of privacy implicit in the overall scheme of constitutional liberty.⁸⁸ Moreover, the convergence of the free exercise and privacy rights implies that those rights are in reality only integral portions of a monolithic liberty implicit in the Lockean theory of government.⁸⁹

There are certain sets of cases in which virtually identical conduct has been claimed constitutionally protected under different theories,⁹⁰ and with few exceptions, held to be so protected.⁹¹ A discussion of these cases will illustrate the unitary, holistic nature of constitutional liberty, which could be judicially recognized despite potential difficulty of fitting the particular conduct within a category traditionally accorded constitutional protection.⁹²

1. The Right to Control the Quality of One's Consciousness—Drug Use

In *People v. Woody*,⁹³ the Supreme Court of California held

116 U. PA. L. REV. 479 (1968); Stahmer, *Defining Religion: Federal Aid and Academic Freedom*, in RELIGION AND THE PUBLIC ORDER, 116, 128-29 (D. Gianella ed. 1963).

⁸⁶ See e.g., Callahan v. Woods, 658 F.2d 679, 684 (9th Cir. 1981).

⁸⁷ See Wooley v. Maynard, 430 U.S. 705, 707 n.2 (1977); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943); TRIBE, *supra* note 39, at 901 n.15.

⁸⁸ See Poe v. Ullman, 367 U.S. 497, 521-39 (1961) (Douglas & Harlan, JJ., dissenting from the Court's dismissal of the appeal); See also TRIBE, *supra* note 39, at 884-85.

⁸⁹ See notes 4-18 *supra* and accompanying text. See Poe v. Ullman, 367 U.S. 497, 522 (1961) (Harlan, J., dissenting): This "liberty" is not a series of isolated points pricked out in terms of the taking of property, the freedom of speech, press, and religion; . . . and so on. It is a rational continuum which, broadly speaking, is a freedom from all substantial arbitrary impositions and purposeless restraints.

⁹⁰ The theories being free exercise of religion, and the constitutional right of privacy.

⁹¹ In Whalen v. Roe, 429 U.S. 589 (1977), the Court rejected the privacy claim.

⁹² See TRIBE, *supra* note 39, at 884-85.

⁹³ 61 Cal.2d 716, 40 Cal. Rptr. 69, 394 P.2d 813 (1964) (*en banc*); See also Native Am. Church v. United States, 468 F. Supp. 1247 (S.D.N.Y. 1979), *aff'd without published opinion*, 633 F.2d 205 (2d Cir. 1980); See also State v. Whittingham, 19 Ariz. App. 27, 504 P.2d 950 (1973); Whitehorn v. State, 561 P.2d 539 (Okla. Crim. 1977); *contra* State *ex rel.* Scott v. County, 117 W. Va. 788, 187 S.E.2d 119 (1972).

that members of the Native American Church of California had a constitutional right to use peyote in their religious services under the free exercise clause irrespective of state criminal statutes proscribing such drug use. The right to use peyote was upheld because the practice was central to the claimants' religion⁹⁴ and because their religion was a *bona fide* one.⁹⁵

In *Ravin v. State*⁹⁶ the Supreme Court of Alaska declared the constitutional right of privacy to encompass the right to use marijuana in one's home. Several other state supreme courts have followed suit.⁹⁷ These decisions are premised on the idea that otherwise "criminal" acts, when done in one's home, take on a dignity beyond the efficacy of government to regulate.⁹⁸

There is obviously a common theme in these cases where essentially the same conduct was held to be protected by the constitution, albeit on different grounds. If it is true that "[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men's minds,"⁹⁹ then it is reasonably clear that the claims of liberty at stake in cases such as these transcend the labels of "free exercise of religion" or "privacy." Rather, the right at stake in these cases appears to be the right of the individual to control his consciousness or psychological make-up. Thus viewed, the right goes beyond the free exercise of religion or the concept of privacy, and is susceptible to being thought of as a fundamental right to govern one's identity.¹⁰⁰

Under this analysis of personal liberty, the right to use drugs, whether under the banner of free exercise¹⁰¹ or privacy¹⁰² could be a right upheld as a direct function of the unitary concept of liberty inherent in the constitution and the political theory on which it is based. The free exercise and privacy rights can thus be seen as manifestations of constitutional liberty but not themselves as sources of it.¹⁰³

⁹⁴ 61 Cal.2d 716, 720, 40 Cal. Rptr. 69, 73, 394 P.2d 813, 817.

⁹⁵ *Id.*

⁹⁶ 537 P.2d 494 (Alaska 1975).

⁹⁷ See e.g., *People v. McCabe*, 49 Ill.2d 388, 275 N.E.2d 407 (1971); *People v. Sinclair*, 387 Mich. 91, 194 N.E.2d 878 (1972).

⁹⁸ See *Stanley v. Georgia*, 394 U.S. 557 (1969).

⁹⁹ *Id.* at 565.

¹⁰⁰ *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). See *supra* note 87.

¹⁰¹ U.S. CONST. amend. I.

¹⁰² See *supra* note 2 and accompanying text.

¹⁰³ See *supra* note 10 and accompanying text.

Given the principles underlying the right of privacy, governmental attempts to proscribe drug use are not very defensible. This is especially apparent when one compares drug cases with other cases involving private conduct intended to influence one's perceptions and consciousness. It is true enough that nearly all cases have upheld the government's right to regulate drug use;¹⁰⁴ at the same time it is true that most cases have forbidden the government from attempting to regulate the content of one's reading materials.¹⁰⁵ This is somewhat difficult to reconcile when one considers that in either situation the conduct involves an individual decision to determine the content and direction of one's mental processes.

Laurence Tribe has illustrated this inconsistency in his writings. Commenting on *Stanley v. Georgia*¹⁰⁶ which involved one's right to privately possess pornographic material,¹⁰⁷ Tribe wrote:

If the Stanleys of the world could obtain from a new drug called obscenamine the sensation that Stanley in fact obtained from the obscene film whose possession Georgia sought unsuccessfully to make a crime, one might expect a legislative attempt to make possession or use of obscenamine a criminal offense.¹⁰⁸

What functional distinction is there between one's reading material and the substances one chooses to ingest? If there is any, it is the degree of "harm" caused to the individual, measured perhaps by physical effects. This is however an unsound distinction because there are some substances one may lawfully use, but which are at least as physically harmful as other substances uniformly proclaimed unlawful to use or possess.¹⁰⁹ Thus constitutionally, not to mention logically, the conduct is in essence indistinguishable. Proscriptive drug laws¹¹⁰ seem as vulnerable to constitutional attack as laws regulating one's reading material.

¹⁰⁴ See, e.g., *Stanley v. Georgia*, 394 U.S. 557, 569 n.11 (1969); See also *Wolkind v. Selph*, 495 F. Supp. 507 (E.D. Va. 1980); *National Organization for Reform of Marijuana Laws v. Bell*, 488 F. Supp. 123 (D.D.C. 1980).

¹⁰⁵ *Stanley v. Georgia*, 394 U.S. 557 (1969).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 565.

¹⁰⁸ TRIBE, *supra* note 39, at 910.

¹⁰⁹ *Ravin v. State*, 537 P.2d 494, 513 n.72; *Weiss v. Wizner, Pot, Prayer, Politics and Privacy: The Right to Cut Your Own Throat in Your Own Way*, 54 IOWA L. REV. 709, 723 (1968).

¹¹⁰ Note, *The California Marijuana Possession Statute: An Infringement on the Right of Privacy or other Peripheral Constitutional Rights?* 19 HASTINGS L.J. 758 (1968).

The important point is that if there is no sound factual distinction between these types of conduct (drug use and other conduct routinely protected under the constitution) then there should likewise be no acceptable distinction between the rights used to protect one's liberty to engage in such conduct. This is especially clear when one remembers that 1) in free exercise cases, the Supreme Court has unequivocally adopted the functional definition of religion, which in many circumstances works to protect conduct bearing little resemblance to common notions of religion, and 2) in privacy cases, the Court has shaped the right of privacy so that now it is one's right to make certain personal decisions for oneself.¹¹¹

The upshot of these assertions is that in the fundamental rights jurisprudence of the nation's courts, there is a discernable (if unarticulated) movement toward recognition of a holistic concept of personal liberty, existing independently of the labels one would attach to it. More force is given to this when it is recalled that the constitution itself rests on a block of individualism and personal autonomy.¹¹²

2. Hair Length—The Right to Govern One's Personal Appearance

In *Teterud v. Burns*¹¹³ an incarcerated Cree Indian challenged the constitutional validity of certain prison regulations which limited the length at which inmates could wear their hair. The plaintiff challenged the regulations as violative of his first amendment rights under the free exercise clause.¹¹⁴ Wearing his hair long was a religious act for the plaintiff, but the prison regulation imposed sanctions on him for doing so. The court agreed with him and voided the prison regulation.¹¹⁵ The plaintiff's control of his personal appearance warranted constitutional protection. There have been several lower federal court cases holding similarly.¹¹⁶

There are many decisions in which precisely the same con-

¹¹¹ See notes 30-39 *supra* and accompanying text.

¹¹² See notes 4-18 *supra* and accompanying text.

¹¹³ 522 F.2d 357 (8th Cir. 1975).

¹¹⁴ *Id.* at 359.

¹¹⁵ *Id.* at 362.

¹¹⁶ *Wright v. Raines*, 457 F. Supp. 1082 (D. Kan. 1978); *Geller v. Secretary of Defense*, 423 F. Supp. 16 (D.D.C. 1976); *Frank v. State*, 604 P.2d 1068, 1071 n. 5 (Alaska 1979) (collecting cases).

duct involved in *Teterud* has been held to be protected on grounds other than free exercise, namely, on due process or privacy grounds.¹¹⁷ These cases¹¹⁸ have no discernible trend.¹¹⁹ Importantly, however, the Supreme Court has acknowledged a liberty interest in personal appearance in *Kent v. Dulles*.¹²⁰ The Court there declared a constitutional right to travel and noted that such right "may be as close to the heart of the individual as the choice of what he eats, or wears, or reads."¹²¹

The Court has since refused to interpret broadly this dictum in *Kent v. Dulles*. In *Kelley v. Johnson*¹²² police department rules limiting an officer's right to control his personal appearance (specifically, his hair length) were held constitutionally valid. Justice Marshall dissented forcefully in *Kelley*¹²³ arguing that a denial of plaintiff's right to govern his personal appearance unfettered by the government would be "fundamentally inconsistent with the values of privacy, self identity, autonomy, and personal liberty that . . . the Constitution was designed to protect."¹²⁴ This is remarkably similar to the court's finding in *Teterud v. Burns*¹²⁵ that the plaintiff's religious practice of wearing his hair at a desired length helped develop "his sense of identity and self respect"¹²⁶

That the Supreme Court in *Kelley* upheld the police department hair length regulation there challenged in no way shuts the door to such constitutional claims. There are a great many of these cases,¹²⁷ with a like number of factual permutations. *Kelley* itself was not intended to lay down a hard and fast rule.¹²⁸ Thus it is safe to say that the abundance of lower federal court rulings on the issue still have significance.

¹¹⁷ See Recent Cases, 84 HARV. L. REV. 1702 (1971); Comment, *Public Schools, Long Hair, and the Constitution*, 55 IOWA L. REV. 707 (1970).

¹¹⁸ Compare *Richards v. Thurston*, 424 F.2d 1281 (1st Cir. 1970) with *Karr v. Schmidt*, 460 F.2d 609 (5th Cir.), cert. denied, 409 U.S. 989 (1972).

¹¹⁹ See *TRIBE*, *supra* note 39, at 962.

¹²⁰ 357 U.S. 116 (1958). See also *Craven, Personhood: The Right to Be Let Alone*, 1976 DUKE L.J. 699 n.2.

¹²¹ 357 U.S. at 125-26.

¹²² 425 U.S. 238 (1976).

¹²³ *Id.* at 249 (Marshall, J., dissenting).

¹²⁴ *Id.* at 251.

¹²⁵ 522 F.2d 357 (8th Cir. 1975).

¹²⁶ *Id.* at 361 n.11.

¹²⁷ See *supra* note 117.

¹²⁸ 425 U.S. at 249.

Most of these cases proceeded on the theory that the government, by attempting to control one's hair length, was violating the plaintiff's right to liberty under the due process clause under the fourteenth amendment,¹²⁹ or in the same vein, violating the plaintiff's penumbral right to privacy identified in *Griswold v. Connecticut*.¹³⁰ Other courts have analyzed the asserted right to govern personal appearance with reference to the ninth amendment.¹³¹

These hairlength cases are not as important for their decision on the issue of the right to be hirsute as they are for their recognition that one's personal appearance is intimately bound up with one's self-image, personal identity, and, in the broader sense, with the notion of individualism on which every claim of constitutional liberty is founded. One court has noted that the differences between the analytical approaches available to decide one's right to engage in conduct fundamental to personal identity "are in considerable measure more semantic than real, and that there is indeed a common theme in all these cases."¹³² If this judicially-recognized idea of commonality can exist in cases in which the right to govern personal appearance obtains under the banner of due process liberty,¹³³ constitutional privacy,¹³⁴ or the ninth amendment,¹³⁵ then certainly it can exist in cases in which the same right is sought to be protected under the aegis of free exercise¹³⁶ or the grounds just mentioned.

The cases dealing with hair length are the same as the cases dealing with drug use. In neither is there a functional distinction between personal liberty and a privacy based claim of personal liberty. Where the plaintiff claims the right to engage in certain conduct "fundamental to what it means to be human at a given

¹²⁹ *Richards v. Thurston*, 424 F.2d 1281 (1st Cir. 1970).

¹³⁰ *Breen v. Kahl*, 419 F.2d 1034, 1036 (7th Cir. 1969).

¹³¹ *Bishop v. Colaw*, 450 F.2d 1069 (8th Cir. 1971).

¹³² *Stull v. School Bd. of W. Beaver Jr. - Sr. High School*, 459 F.2d 339, 347 (3d Cir. 1972). In *Dawson v. Hillsborough County School Bd.*, 322 F. Supp. 286 (M.D. Fla. 1971), the court upheld the plaintiff's right to wear his hair at his chosen length, and in so doing stated: "[w]hether this right is characterized as protected by the First Amendment . . . , the Ninth Amendment . . . , or the Fourteenth Amendment . . . is of no import." 322 F. Supp. at 304.

¹³³ *Richards v. Thurston*, 424 F.2d 1281 (1st Cir. 1970).

¹³⁴ *Breen v. Kahl*, 419 F.2d 1034 (8th Cir. 1971).

¹³⁵ *Bishop v. Colaw*, 450 F.2d 1069 (8th Cir. 1971).

¹³⁶ See *supra* note 116.

time and place,"¹³⁷ it helps to understand the interests at stake when one remembers that the liberty asserted stems from a common source, deserving protection even though not easily conformable to precedent.

3. The Right to Control Disclosure to the Government of Personal Information About Oneself

In *Whalen v. Roe*,¹³⁸ the Supreme Court decided that it was constitutionally permissible for New York to keep computerized records on persons who had been lawfully prescribed certain drugs for which there was arguably an unlawful use or market. The plaintiffs there alleged that the state statutory scheme invaded "a constitutionally protected 'zone of privacy'."¹³⁹ The Court expressly acknowledged the two distinct types of privacy interests discussed earlier:¹⁴⁰ "... the individual interest in avoiding disclosure of personal matters, and ... the interest in independence in making certain kinds of important decisions."¹⁴¹ The plaintiffs theorized that the state's possession of records of their lawful use of otherwise proscribed substances created a grave risk that such information could become known publicly, and adversely affect their reputations.¹⁴² The Court rejected these privacy claims, holding that while the privacy interests of the plaintiffs were legitimate, there was an insufficient threat to either interest to warrant a holding of constitutional infirmity.¹⁴³

Now consider *Stevens v. Berger*.¹⁴⁴ Here the plaintiffs sought to bar state and federal welfare agencies from ceasing payment of benefits. The theory was that the agencies were violating the free exercise clause and the right to privacy by requiring plain-

¹³⁷ *TRIBE*, *supra* note 39, at 892.

¹³⁸ 429 U.S. 589 (1977).

¹³⁹ *Id.* at 599. See also *McElrath v. Califano*, 615 F.2d 434 (7th Cir. 1980); *Doe v. Sharp*, 491 F. Supp. 346 (D. Mass. 1980).

¹⁴⁰ See *supra* notes 30-39 and accompanying text.

¹⁴¹ *Whalen v. Roe*, 429 U.S. at 599-600 (footnotes omitted).

¹⁴² *Id.* See also *Paul v. Davis*, 424 U.S. 693 (1976).

¹⁴³ *Id.* at 603. But see *Utz v. Cullinane*, 520 F.2d 467, 482 n.41 (D.C. Cir. 1975): "It would seem that the right to privacy should encompass a substantial measure of freedom for the individual to choose for himself the extent to which the government could divulge information about him."

¹⁴⁴ 428 F. Supp. 896 (E.D.N.Y. 1977).

tiffs to furnish their children's social security numbers as a condition to continued receipt of public assistance benefits.¹⁴⁵

Specifically, the plaintiffs claimed that the use of social security numbers was a device of the Antichrist,¹⁴⁶ and that if they were required to furnish them to the government, they would be barred from entering Heaven.¹⁴⁷ The court felt the first amendment claim to be a sufficient ground for decision of the case and thus found it unnecessary to examine the privacy claim.¹⁴⁸

The court employed traditional free exercise analysis examining the sincerity¹⁴⁹ and centrality¹⁵⁰ of plaintiff's religious convictions, and found that they were adequate to warrant the court's balancing of them against countervailing governmental interests.¹⁵¹ The plaintiff's claim was upheld because the government's attempt to sanction refusal to divulge this information violated the plaintiff's right to free exercise of religion.¹⁵²

These cases represent another instance in which courts were asked to decide claims based on practically identical conduct, and on nominally different constitutional guarantees. There must be an essential similarity between these constitutional rights if they can be independently asserted to protect the same conduct. There-

¹⁴⁵ *Id.* at 897. Plaintiffs subjected to the requirements of section 402(a)25 of the Social Security Act, 42 U.S.C. § 402(a)25 (1976), which required disclosure of the numbers.

¹⁴⁶ *Id.* After tracing the historical basis of belief in the Antichrist, the court noted:

Since having a social security number in this society has become a prerequisite for so many of the society's benefits (both from the public and private sectors), no great leap of imagination is necessary to travel from the exegesis of *Revelation* to the plaintiffs' belief that such numbers could function, if the state were to become too powerful, like the mark of the Antichrist spoken of in the biblical text. With the history and literature marshalled by plaintiffs to support their contention, their belief must be characterized as religious for purposes of this case.

Id. at 905.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 899.

¹⁴⁹ *United States v. Seeger*, 380 U.S. 163, 185 (1965).

¹⁵⁰ *TRIBE*, *supra* note 39, at 859.

¹⁵¹ *Stevens v. Berger*, 428 F. Supp. 896, 905.

¹⁵² *Id.* at 908. *Accord* Callahan v. Woods, 658 F.2d 679 (9th Cir. 1981), *rev'g*, 479 F. Supp. 621 (N.D. Cal. 1979); *Cf.* Mullaney v. Woods, 97 Cal. App. 3d 710, 159 Cal. Rptr. 902 (1979).

fore, because a court decided on one hand that freedom from disclosure of information may be constitutionally protected by privacy rights, as in *Whalen*¹⁵³ and on the other hand by the free exercise guarantee, as in *Stevens*,¹⁵⁴ the theories the courts used to achieve their decisions may be in reality "verbal variations of the same constitutional rights."¹⁵⁵ The rights perforce have the same function if they protect the same conduct.

4. Family Integrity—The Constitutional Right of the Family to Conduct Itself Without Governmental Interference

The most seminal of the Supreme Court's decisions on fundamental rights is *Meyer v. Nebraska*.¹⁵⁶ There the Court held unconstitutional the government's attempts to intrude on the province of the family to educate children as it wishes.¹⁵⁷ Similarly, in *Pierce v. Society of Sisters*,¹⁵⁸ the Court invalidated state laws prohibiting children from attending other than public schools.¹⁵⁹ These cases are among the first to draw the contours of the rights protected under the due process clause of the fourteenth amendment. They rest entirely on grounds of substantive due process.¹⁶⁰

In *Wisconsin v. Yoder*,¹⁶¹ the Court was confronted with a similar factual situation. Members of the Old Order Amish denomination challenged the constitutionality of state compulsory school attendance laws.¹⁶² They claimed that governmentally compelled school attendance violated their rights under the first and fourteenth amendments.¹⁶³ The Court sustained the contentions of the religious claimants.

¹⁵³ *Whalen v. Roe*, 429 U.S. at 606 (concurring opinion).

¹⁵⁴ *Stevens v. Berger*, 428 F. Supp. 896 (E.D.N.Y. 1977); *Accord Callahan v. Woods*, 658 F.2d 679 (9th Cir. 1981), *rev'g*, 479 F. Supp. 621 (N.D. Cal. 1979).

¹⁵⁵ *Runyon v. McRary*, 427 U.S. 160, 178 n.15 (1976).

¹⁵⁶ 262 U.S. 390 (1923).

¹⁵⁷ *Id.* at 403.

¹⁵⁸ 268 U.S. 510 (1925).

¹⁵⁹ *Id.* at 519.

¹⁶⁰ See Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 937-43 (1973). This note does not propose to criticize the analyses used by the Supreme Court in deciding constitutional challenges to governmental restrictions on economic as opposed to other manifestations of liberty. See BERGER, GOVERNMENT BY JUDICIARY 268 n.89 (1977); see also note 42 *supra* and accompanying text.

¹⁶¹ 406 U.S. 205 (1972).

¹⁶² *Id.* at 207.

¹⁶³ *Id.*

Yoder was decided upon the same grounds that *Meyer* and *Pierce* were decided, that is, that the family is in most cases beyond the pale of governmental interference.¹⁶⁴ Significantly, however, *Yoder* also rested on the free exercise guarantee.¹⁶⁵ *Pierce* was factually almost identical to *Yoder* and could very easily have been decided on the free exercise theory.¹⁶⁶

When highly similar conduct is held deserving of constitutional protection whether under the aegis of one or the other constitutional right, something important is said about the nature of these rights. The rights must in essence be the same. When the Supreme Court decided *Griswold v. Connecticut*,¹⁶⁷ it cited *Meyer* and *Pierce* to support its creation of the "emanational" or "penumbral" right of constitutional privacy.¹⁶⁸ And in *Runyon v. McRary*¹⁶⁹ the Court noted that "The *Meyer-Pierce-Yoder* 'parental' right of privacy, while dealt with separately . . . may be no more than verbal variations of a single constitutional right."¹⁷⁰ Likewise, *Griswold*, and the *Meyer-Pierce-Yoder* combination of rights, may be no more than free exercise cases in disguise:

Like religious beliefs, belief [in the areas of marriage, procreation and child rearing] are often deeply held, involving loyalties fully as powerful as those that bind the citizen to the state. Decisions on these matters tend to affect the quality of an entire lifetime, and may not easily be reversed. The choice of whom to marry or whether or not to have a child, once taken, will have as strong an impact on the life patterns of the individuals involved for years to come as any adoption of a religious belief or viewpoint. Decisions of families in the area of 'privacy' like decisions of individuals in the area of religion, cannot easily be controlled by the state; and the devices needed for effective enforcement of state policy may themselves be so intrusive as to

¹⁶⁴ *Id.* at 232-33. See also *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

¹⁶⁵ *Id.* at 219.

¹⁶⁶ *Moody v. Cronin*, 484 F. Supp. 270 (C.D. Ill. 1979); *Pierce* involved the right of parents to educate their children at private religious schools. 268 U.S. 510 (1935); *Yoder*, 406 U.S. 205, 233.

¹⁶⁷ 381 U.S. 479 (1965). In fact, although *Griswold* is best known for its creation of the penumbral right to privacy, later decisions, such as *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977), make it clear that "the teaching of *Griswold* is that the Constitution protects individual decisions in matters of child bearing from unjustified intrusion by the State." 431 U.S. at 687.

¹⁶⁸ *Id.* at 484.

¹⁶⁹ 427 U.S. 160 (1976).

¹⁷⁰ *Id.* at 178 n.15 (emphasis added).

be deeply offensive. At the same time, the impact of an individual's decisions on questions of marriage, procreation and child rearing diminishes greatly beyond the setting of the family itself, just as most religious practices affect primarily those who adopt and engage in them.¹⁷¹

This is especially tenable when it is recalled that current free exercise doctrine embraces the functional definition of religion, and includes in its sphere of protection conduct not ordinarily thought of as religious.¹⁷²

These cases giving constitutional protection to the integrity of the family depict another factual pattern where the free exercise guarantee and the right of privacy seem to be used interchangeably as case theories. This interchangeability in turn supports the hypothesis that at the heart of the analysis used by a court deciding issues of constitutional liberty is a monolithic freedom entwined in the political theory of the constitution.¹⁷³

III. CONCLUSION

The key to understanding the tensions involved in the conflict between government and the individual is in understanding the political theory on which the source of our legal liberty, the constitution, is based. That is why it becomes important to incorporate into our understanding of constitutional law the thought of John Locke, and his idea of the social contract.

The constitution, and specifically the Bill of Rights, has been viewed here as an image of the vast body of liberty intended by the Framers to have been reserved to the people.¹⁷⁴ The theoretical overlap¹⁷⁵ between the privacy and the free exercise cases is one vehicle for demonstrating that view.

Nicholas L. DiVita

¹⁷¹ Heymann & Barzelay, *The Forest and the Trees: Roe v. Wade and its Critics*, 53 B.U.L. REV. 765, 773-74 (1973).

¹⁷² See, e.g., note 4 *supra* and accompanying text.

¹⁷³ See *supra* notes 4-18 and accompanying text; See also note 89 *supra* and cases therein.

¹⁷⁴ See generally Grant, *The Natural Law Background of Due Process*, 31 COLUM. L. REV. 56 (1931); Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 249 (1928).

¹⁷⁵ Callahan v. Woods, 658 F.2d 679, 684 (9th Cir. 1981); the "area of overlap" alluded to by this Note is "presumed protected."